1-24-2014

State v. Larson Respondent's Brief 1 Dckt. 40091

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 40091
Plaintiff-Respondent,	)	
	)	Bonner Co. Case No.
vs.	)	CR-2011-1223
	)	
RICHARD ALLEN LARSON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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District Judge

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Nature Of The Case

Richard Allen Larson appeals from the judgment entered upon the jury verdicts finding him guilty of two counts of aggravated assault. Larson claims the district court committed evidentiary error and that the prosecutor committed misconduct in closing argument.

Statement Of Facts And Course Of Proceedings

Lora Adams had a brief romantic relationship with Larson. (Tr.[1], p.185, L.12 – p.188, L.20.) Larson did not respond well when Adams told him she just wanted to be friends – he developed a pattern of being angry, then apologetic, and he started to become threatening, acting like he was going to hit Adams. (Tr., p.188, L.19 – p.191, L.6.)

Adams and Larson were also neighbors in a somewhat rural area in Bonner County and Adams had to drive past Larson's property in order to get to her house. (Tr., p.181, L.9 - p.185, L.1.) Larson would stop Adams a couple of times per week as she was traveling to or from her house. (Tr., p.200, Ls.4-13.) At one point, Larson told Adams he was going to erect gates at the property line and make her life a "living hell." (Tr., p.198, Ls.6-11.) As promised, Larson erected gates across the road that Adams had to open in order to get home. (Tr., p.198, L.22 – p.199, L.10, p.201, Ls.4-6; see p.213, Ls.5-22.)

[1] There are three transcripts included in the record on appeal. All transcript references in this brief will be to the trial transcript.

Larson's confrontational behavior escalated after John Bilsky came to stay with Adams for several weeks. (Tr., p.196, L.20 – p.197, L.18) Larson started shooting his gun off in his yard and would call Adams, hang up, and go outside and fire more rounds. (Tr., p.201, L.11 - p.203, L.5.) Adams ultimately decided to sell her home because of Larson's behavior. (Tr., p.199, L.14 – p.200, L.8.)

One afternoon, after Adams sold her home and was preparing to move, she encountered Larson waiting for her on her way home. (Tr., p.207, L.22 - p.212, L.17.) Before being confronted by Larson that day, Adams called Bilsky to let him know she was on her way – a practice Adams and Bilsky had established given the situation with Larson because there was a point at which Adams no longer had cell service and the only way to communicate was by walkie talkie. (Tr., p.209, L.24 – p.210, L.18.) When Adams called Bilsky that day, Bilsky warned her Larson had been shooting his gun again. (Tr., p.210, L.24 – p.211, L.3.) As Adams approached the gate, which was closed, she saw Larson laying on his ATV and reported such to Bilsky. (Tr., p.212, Ls.13-23.)

When Adams got out of her car to unlatch the gate, Larson said, "You effin' skinny little bitch are you gonna to [sic] throw the cable in the snow like you always do?" (Tr., p.213, Ls.11-14.) Adams ignored Larson as she unlatched the gate to drive through while Larson followed her and yelled obscenities at her and called her names. (Tr., p.213, L.15 - p.214, L.13.) Adams testified Larson was "enraged." (Tr., p.214, Ls.18-20.)

Larson would not let Adams get back in her car, so Adams "tried to knee" Larson "in the stomach or in the groin" in an effort to get away. (Tr., p.215, L.6 –

p.216, L.10.) After that, Larson and Adams exchanged words and Larson started punching Adams in the side of the head. (Tr., p.216, Ls.11-20.) Larson stopped hitting Adams when Adams yelled for Bilsky but "somehow" Adams was "flung" from where she was standing by her car door and she fell down into a snow berm behind her bumper. (Tr., p.217, Ls.5-16.) As Adams tried to get up, Larson "shoved" her and straddled her on the ground and pulled out his gun. (Tr., p.217, Ls.18-19, p.231, L.12 – p.232, L.21.) Larson stuck the gun in Adams' face and said, "I'm going to kill you and I want you to be more afraid than you've ever been in your life." (Tr., p.233, L.9 – p.234, L.14.) Larson spit in Adams' face and grabbed Adams' throat and squeezed it until Adams could not breathe. (Tr., p.234, L.19 – p.235, L.16.)

Bilsky, concerned that Adams was taking longer to get home than she should based on the timing of her call, left the house on foot and went to find her. (Tr., p.324, L.8 – p.326, L.2.) Bilsky whistled to let Adams know he was there and to "hopefully . . . get a shout or something like that." (Tr., p.327, L.21 – p.328, L.1.) When Larson heard the whistle, he straightened and Adams pushed the gun away from her face and kicked Larson off of her. (Tr., p.238, L.2 – p.240, L.19.) By that time, Bilsky was there and Larson pointed the gun at him, told him to leave, and said, "I'll kill you." (Tr., p.242, Ls.1-22, p.337, Ls.16-22.) Bilsky said he was leaving and started to retreat but asked Adams if she was okay. (Tr., p.242, L.21 – p.243, L.22, p.337, L.24 – p.339, L.6.) Adams answered, "no," and Larson started shooting in Bilsky's direction. (Tr., p.243, Ls.22-23.)

Bilsky, who was also armed, returned fire. (Tr., p.340, L.19 – p.341, L.4.) Although Adams and Bilsky did not see any blood or see Larson respond as though he had been shot, Larson said he was shot in the chest and started to walk away.[2] (Tr., p.246, Ls.1-8, p.342, Ls.6-25.) Larson then kneeled and Adams thought he was "reloading," at which point she and Bilsky got in the car and escaped to Adams' house and called 911. (Tr., p.245, L.21 – p.249, L.12, p.343, L.2 – p.344, L.8.)

The state charged Larson with two counts of aggravated assault. (R., pp.15-16, 49-50.) Larson pled not guilty and the case proceeded to trial at which the jury found Larson guilty of both counts. (R., pp.55, 124, 126.) Larson filed a motion to set aside the jury's verdicts and for a judgment of acquittal and a motion for new trial, which the court denied. (R., pp.129-130, 140, 142-143,160.) The court imposed a unified five-year sentence with two years fixed. (R., pp.171-173.) Larson filed a timely notice of appeal. (R., pp.175-177.)

[2] Larson was treated for a gunshot wound. (Tr., p.638, Ls.1-21.)

ISSUES

Larson states the issues on appeal as:

> 1. Did the district court err in allowing the opinion testimony of Detective Johnston as an expert witness as to the science of ballistics?
>
> 2. Did the State commit prosecutorial misconduct?

(Appellant's Brief, p.7.)

The state rephrases the issues on appeal as:

1. Has Larson failed to show the district court abused its discretion in determining Detective Johnston had sufficient training and experience to support his opinion testimony regarding the direction one of the bullets traveled?

2. Has Johnston failed to show the district court erred in overruling his objection to the prosecutor's closing argument?

ARGUMENT

I.
Larson Has Failed To Show The District Court Abused Its Discretion In Allowing Detective Johnston To Testify About The Direction One Of The Bullets Travelled

A. Introduction

Larson asserts the district court erred in allowing Detective Gary Johnston to testify as an expert witness. (Appellant's Brief, pp.9-11.) According to Larson, Detective Johnston could not testify as an expert absent foundational testimony "as to what classes or courses he took," "that he was responsible for ascertaining bullet directionality" in other investigations, and "that he trains others" on "determining directionality of projectiles." (Appellant's Brief, p.10.) The law does not support Larson's argument. The district court correctly concluded that Detective Johnston was qualified to testify as to his opinion on which direction one of the bullets travelled.

B. Standard Of Review

"The decision whether to admit evidence at trial is generally within the province of the trial court." State v. Healy, 151 Idaho 734, 736, 264 P.3d 75, 77 (Ct. App. 2011) (citation omitted). "A trial court's decision regarding the admission of expert testimony is reviewed for an abuse of discretion." State v. Pearce, 146 Idaho 241, 245, 192 P.3d 1065, 1069 (2008) (citing State v. Merwin, 131 Idaho 642, 645, 962 P.2d 1026, 1029 (1998)). When the appellate court reviews an evidentiary ruling for abuse of discretion, it considers "(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of its discretion and consistently with any legal

standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." Id. (citation omitted).

C. The District Court Did Not Err In Allowing Detective Johnston To Testify Regarding The Direction Travelled By One Of The Bullets

Larson asserts the district court erred in allowing Detective Johnston to "testify as to the directionality of the bullet through Ms. Adams' window." (Appellant's Brief, p.8.) Specifically, Larson contends there was a lack of adequate foundation that Detective Johnston was an expert because "there was no information as to what classes or courses he took," he "never testified that he was the person responsible for ascertaining bullet directionality in any of the[ ] investigations" he had been involved in, and "at no point did he state that he trains others" "in determining directionality of projectiles." (Appellant's Brief, p.10.) Larson's claim fails because the detailed foundational requirements he complains were lacking are not required in order to qualify a witness as an expert.

Expert testimony is admissible if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." State v. Joslin, 145 Idaho 75, 81, 175 P.3d 764, 770 (2007) (quotations omitted); see also I.R.E. 702. "The foundational requirements for expert testimony are set forth in Idaho Rule of Evidence 702." Grover v. Isom, 137 Idaho 770, 774, 53 P.3d 821, 825 (Ct. App. 2002); see also Pearce, 146 Idaho at 245, 192 P.3d at 1069 ("Idaho Rule of Evidence 702 is the appropriate test for measuring the reliability of evidence of expert testimony."). Rule 702 provides that "a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." I.R.E. 702.

On direct examination the prosecutor asked Detective Johnston about damage on Adams' car. (Tr., p.523, Ls.7-8.) Detective Johnston responded, "There was . . . what appeared to be a bullet hole through the mirror from front to back." (Tr., p.523, Ls.9-10.) Larson objected on the basis that Detective Johnston was "not qualified as an expert" and the court sustained the objection for lack of foundation. (Tr., p.523, Ls.12-23.) The prosecutor subsequently laid the requisite foundation:

> Q: Okay. Detective, have you had training with regard to ballistics, bullet travel and investigations relating to bullets?
>
> A: Very general training.
>
> Q: Very general training. Okay. How general?
>
> A: Years of -- years of -- 20 years of carrying a firearm virtually every day, qualifications, some schooling in shootings, related to not so much vehicles but other things. Just general training in that category, yes.
>
> Q: How many investigations have you been involved in which have required a determination as to which direction a bullet had entered and exited an object?
>
> A: Over -- over my 20-year career?
>
> Q: Sure.
>
> A: I couldn't even begin to guess. I would say probably more than -- probably between 50 and 100.
>
> Q: Okay.
>
> A: I guess.

> Q: All right. What does it entail to make that determination as to direction of travel of a bullet?
>
> . . .
>
> A: Generally, when a bullet enters an object, the entrance hole is the size or diameter of the bullet. When it exits, it's mushrooming and creating force, which would indicate a bigger hole. So where it enters, it would be the same size as the bullet; where it exits, it's increased larger in the hole.

(Tr., p.524, L.25 – p.526, L.11.)

Detective Johnston then described how to "determine the travel of a projectile with regard to different types of objects," such as wood, plastic, and paper, all of which was based on his training and experience. (Tr., p.526, L.23 – p.10.) Detective Johnston also noted he has assisted others in determining "directionality of projectiles." (Tr., p.529, L.24 – p.530, L.6.) Applying his training and experience to the bullet hole in Adams' mirror, Detective Johnston testified the "fiberglass side of the mirror" "had a very small entrance hole" and a "considerably bigger" hole coming out the other side, leading him to conclude "that particular bullet traveled from front to back." (Tr., p.530, L.19 – p.531, L.10.)

The district court correctly concluded there was adequate foundation for Detective Johnston to "make an opinion concerning going through the mirror." (Tr., p.535, Ls.14-17.) Detective Johnston's general training regarding ballistics and bullet travel and his investigatory experience in making determinations regarding the travel of bullets was more than sufficient under I.R.E. 702. The law does not require foundation in the form of detailing specific classes taken and Larson's attempt to undermine Detective Johnston's expertise by noting that Detective Johnston only testified he was "involved in" and "reviewed" such

evidence is unpersuasive as it is obvious from his testimony that he made such determinations himself and did not, as Larson suggests, merely watch others do so. Even if that were the case, it is unclear why Detective Johnston would not be qualified to offer an opinion based on his "knowledge, skill, experience, training, **or** education." I.R.E. 702 (emphasis added). If that were the standard, a witness could never qualify as an expert because every expert must have a first experience making his or her own determination.

The Court's opinion in Pearce, upon which Larson relies, does not support Larson's claim of error. (Appellant's Brief, p.9.) As Larson notes, the Court in Pearce stated, "There must be some demonstration that the witness has acquired, through some type of training, education or experience, the necessary expertise and knowledge to render the proffered opinion." (Appellant's Brief, p.9 (quoting Pearce at 246, 192 P.3d at 1070 (emphasis by Larson omitted).) For the reasons stated, that standard was satisfied in this case. As in Pearce, the district court "viewed the issue as one of discretion, acted within the bounds of its discretion, and reached its decision by an exercise of reason." 146 Idaho at 247, 192 P.3d at 1071. Larson has failed to establish otherwise.

Even if the district court erred in allowing Detective Johnston to testify about the direction the bullet traveled through the mirror of Adams' car, any such error is harmless. "If the Court finds that the district court abused its discretion in admitting or excluding the evidence, then the Court must declare a belief beyond a reasonable doubt that the error did not affect the outcome of the trial, in order to find that the error was harmless and not reversible." State v. Almaraz, 154

Idaho 584, 598, 301 P.3d 242, 256 (2013) (citation omitted). "In other words, the error is harmless if the Court finds that the result would be the same without the error." Id.

As noted by Larson, the "issue in this case [was] whether Mr. Larson shot first at Mr. Bilsky or whether he merely shot pell-mell after being hit in the chest by two rounds from Mr. Bilsky's gun." (Appellant's Brief, p.8.) While the direction the bullet traveled may have been relevant to show where Larson and Bilsky were standing when shots were fired, it was irrelevant to the "issue" of who "shot first." The conclusion that Detective Johnston's testimony regarding the direction of the bullet was insignificant in relation to Larson's defense is consistent with the fact that Larson did not cross-examine him on this point or any other. (Tr., p.546, Ls.20-22 (defense counsel stating she had no questions for Detective Johnston).) Thus, even assuming error in the admission of Detective Johnston's testimony that the bullet that passed through Adams' mirror traveled from "front to back," the error was harmless.

II.
Larson Has Failed To Show The District Court Erred In Overruling His Objection To The Prosecutor's Closing Argument Regarding Intent

A. Introduction

Larson claims the district court erred in overruling his objection to the prosecutor's closing argument on the meaning of intent. (Appellant's Brief, pp.11-14.) Larson's claim of error is premised on the assertion that the prosecutor misstated what the jury was required to find with respect to Larson's intent in order to find him guilty of aggravated assault. (Appellant's Brief, pp.12-

14.) Because Larson has failed to show error in the prosecutor's statement, he has necessarily failed to demonstrate that the district court erred in overruling his contemporaneous objection.[3]

B. Standard Of Review

"Due process issues are generally questions of law, and this Court exercises free review over questions of law." Kootenai Medical Center ex rel. Teresa K. v. Idaho Dept. of Health and Welfare, 147 Idaho 872, 216 P.3d 630 (2009) (citations and quotations omitted). A defendant who claims the prosecutor engaged in misconduct has the burden of proving such. State v. Ellington, 151 Idaho 53, 59, 253 P.3d 727, 733 (2011) (citing State v. Perry, 150 Idaho 209, 227-28, 245 P.3d 961, 979-80 (2010)). If the alleged misconduct is followed by a contemporaneous objection, and if the reviewing court finds error, the error is reviewed under the harmless error standard. Id. (citing Perry at 227, 245 P.3d at 979).

C. Larson Has Failed To Show Error In The Prosecutor's Closing Argument

The prosecutor began his closing argument by "draw[ing]" the jury's attention to Instruction No. 13. (Tr., p.795, Ls.17-18.) Instruction No. 13 reads: "In every crime or public offense, there must exist a union or joint operation of act and intent." (Instruction No. 13 (exhibit).) The prosecutor commented that the

[3] Larson alternatively argues that if his objections to the prosecutor's statements were not "sufficiently specific," the error is fundamental. (Appellant's Brief, pp.14-17.) Because the state believes Larson's objection was adequate to preserve the claim of error raised on appeal, it will not analyze this issue under the fundamental error standard or respond to Larson's arguments in relation to that standard.

instruction "is not a model of clarity" and "submit[ted] that the word 'intent' in this context does not mean the intent to commit a crime." (Tr., p.795, Ls.18-23.) Larson objected, arguing "it's not up to the prosecution to explain the jury instructions. He can argue what they mean but he cannot explain or elucidate." (Tr., p.796, Ls.3-6.) The court overruled the objection. (Tr., p.796, L.7.)

The prosecutor continued:

> What that jury instruction speaks to is you don't have to have the intent to commit the crime itself; you have the intent to commit the interdicted act. That is, you don't have to have the intent to commit the crime of aggravated assault; you have to have the intent to point and point the weapon, use -- . . . so in an assaultive manner.

(Tr., p.796, L.16 - p.797, L.1.) Larson again objected, complaining the prosecutor was "explaining and defining what that means." (Tr., p.797, Ls.2-3.) The court "allow[ed] [it] as argument" (Tr., p.797, Ls.4-5), and the prosecutor completed his explanation, stating: "So not unlike a DUI, to put it in context, you don't have to have the intent to drive while under the influence of alcohol; you simply have to have the intent to drive the automobile. That's what that instruction means" (Tr., p.797, Ls.7-12).

Larson asserts the prosecutor's argument "lowered the State's burden of proof and left the jury with the impression that it could convict [him] even if it found that he did not intend to make a threat or commit a battery." (Appellant's Brief, p.14.) Larson's interpretation of the prosecutor's comments is incorrect.

The point of the prosecutor's comments in relation to Instruction No. 13 was to explain to the jury that that particular instruction did not require a separate intent; rather, the only intent the state was required to prove was the intent to

commit the "interdicted act." The interdicted acts are those alleged in the elements instruction – in this case, Instruction Nos. 16 and 17. (Exhibits.) Instruction No. 16 advised the jury, in relevant part, that to find Larson guilty of aggravated assault on Adams, it had to conclude, beyond a reasonable doubt, that Larson committed the assault "by threatening by word and/or act to do violence upon" her. (Instruction No. 16 (exhibit).) With respect to the aggravated assault on Bilsky, Instruction No. 17 advised the jury it had to conclude, beyond a reasonable doubt, that Larson committed the assault "by attempting to commit a violent injury upon the person of John Bilsky, and/or by threatening by word and/or act to do violence upon the person of John Bilsky." (Instruction No. 17 (exhibit).) The prosecutor's comments did not explicitly or implicitly negate these elements; rather, for purposes of deciding intent, the prosecutor specifically directed the jury's attention to the "interdicted acts."

Nor were the prosecutor's comments inconsistent with the law. "[A]ggravated assault under I.C. § 18-901(b) requires an intent to make a threat, by word or act, to do violence to another" but does not require an "actual intention to cause apprehension." State v. Pole, 139 Idaho 370, 373, 79 P.3d 729, 732 (Ct. App. 2003). The prosecutor's statement that he did not have to prove the intent to commit "the crime of aggravated assault" but only the intent to "point the weapon . . . in an assaultive manner" was consistent with the law.

Other than directing the jury to the intent related to the "interdicted act," the prosecutor made no express reference to the alternative means of committing the aggravated assault against Bilsky, *i.e.*, "by attempting to commit a

violent injury upon [his] person." Again, his only point was that Instruction No. 13 did not mean that Larson had to have the "intent to commit the crime itself." This is an accurate statement. As explained in State v. Bonaparte, 114 Idaho 577, 580, 759 P.2d 83, 86 (Ct. App. 1988):

> [T]he criminal intent which is required for assault with a deadly weapon . . . is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another. Given that intent it is immaterial whether or not the defendant intended to violate the law or knew that his conduct was unlawful. The intent to cause any particular injury, to severely injure another, or to injure in the sense of inflicting bodily harm is not necessary.

Bonaparte, 114 Idaho at 580, 759 P.2d at 86 (citations omitted).

Because the prosecutor's comments regarding Instruction No. 13 were not erroneous, Larson has failed to show the district court erred in overruling his objections to them. Even if the Court disagrees, the Court can conclude beyond a reasonable doubt that the prosecutor's complained-of statements did not contribute to the jury's verdict. "[I]n order to find that the error was harmless and not reversible," the appellate court "must declare a belief beyond a reasonable doubt that the misconduct did not contribute to the jury's verdict." Ellington, 151 Idaho at 59, 253 P.3d at 733 (citing Perry, 150 Idaho at 227-28, 245 P.3d at 979-80).

There was overwhelming evidence presented at trial that Larson was guilty of committing an aggravated assault against Adams and Bilsky. Compare State v. Aguilar, 154 Idaho 201, ___, 296 P.3d 407, 411 (Ct. App. 2012) (finding erroneous admission of expert testimony harmless in part "the evidence adduced at trial was overwhelming that Aguilar committed lewd conduct with three minors

under the age of sixteen"). Larson's defense was not that he did not have the intent necessary to commit the assaults but that his actions were justified because he was somehow defending himself – a defense the jury rejected. (See Instruction No. 2.) Further, the court instructed the jury that it was to "apply the law set forth in [its] instructions" and that it must follow the court's instructions "regardless of . . . what either side may state the law to be." (Instruction No. 3 (exhibit).) The court also instructed the jury it was to consider the instructions "as a whole, not picking out one and disregarding the others." (Id.) Given the weight of the evidence and the court's instructions, which the jury presumably followed, State v. Joy, 155 Idaho 1, ___, 304 P.3d 276, 283 (2013), any error in overruling Larson's objection to the prosecutor's closing argument is harmless.

CONCLUSION

The state respectfully requests that this Court affirm Larson's convictions for aggravated assault.

DATED this 24th day of January, 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of January, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General

JML/pm